In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-825

UNIVERSITY OF SOUTHERN CALIFORNIA, PETITIONER

v.

COST OF LIVING COUNCIL AND OFFICE OF EMERGENCY PREPAREDNESS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

1. Petitioner instituted this action in the United States District Court for the Central District of California to challenge a ruling by the Office of Emergency Preparedness, made pursuant to the Economic Stabilization Act of 1970 (P.L. 91-379, 84 Stat. 799, as amended), that the 50 cent price increase for the university's football tickets violated the Phase I price freeze requirements embodied in Executive Order No. 11615. The district court held that the freeze did not apply to the price of tickets sold in advance of the freeze, and accordingly restrained the Office of Emergency Preparedness and the Cost of Living Council

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from initiating action to compel petitioner to refund 50 cents per ticket to all purchasers (Pet. App. B, pp. 17–24). The Temporary Emergency Court of Appeals reversed, holding that respondents reasonably construed the Executive Order to apply to advance ticket sales when, as here, the sporting events occurred during the freeze (Pet. App. A, pp. 1–16). Petitioner now seeks review of that decision.

2. The decision below is correct, and further review is not warranted.

a. Petitioner's contention (Pet. 9–11) that Executive Order No. 11615 does not support the refund order was thoroughly considered and rejected by the court below (Pet. App. A, pp. 2–16), and we rely on its opinion.[1]

b. There is no merit to petitioner's contention (Pet. 11–12) that the Executive Order, by requiring petitioner to refund excessive charges collected in advance for services rendered during the freeze,[2] im-

[1] The court stated (Pet. App. A, p. 11–12):

"[W]e are faced with the broadest of delegations of authority, delegation that carried with it the power to 'take such . . . action as the [the CLC] determines to be necessary and appropriate to carry out the purposes of the Order.' That such a broad grant of power contains within it the authority to require refunds in situations such as this in order to give maximum effect to the wage-price freeze seems totally reasonable." * * *

[2] Section 205 of the Economic Stabilization Act expressly authorizes district courts to issue mandatory injunctions to effectuate the purpose of the Act, and, as the court below observed (Pet. App. 11), "[t]he power to issue mandatory injunctions includes the power to order restitution or refund of funds held in violation of the regulations and rulings of the CLC and the OEP".

pairs petitioner's right to contract and deprives petitioner of a vested right in violation of the Fifth Amendment to the Constitution. Congress may, consistent with the Fifth Amendment, disturb existing contractual arrangements which are designed to operate in the future. See *Fleming* v. *Rhodes*, 331 U.S. 100; *Dillingham* v. *McLaughlin*, 264 U.S. 370; *Marcus Brown Co.* v. *Feldman*, 256 U.S. 170. "Immunity from federal regulation is not gained through forehanded contracts." *Fleming* v. *Rhodes, supra*, 331 U.S. at 107. The refund order at issue here applies only to charges assessed for prospective games to be played during the freeze, and has no application to sporting events conducted by petitioner prior to that time.

c. Petitioner also contends (Pet. 13–16) that the Executive Order, as applied in this case, is an *ex post facto* law and a bill of attainder in violation of Article I, Section 9, Clause 3. An *ex post facto law* punishes past conduct not unlawful when engaged in. *Calder* v. *Bull*, 3 Dall. 386; *Ex parte Garland*, 4 Wall. 333. "A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *Cummings* v. *Missouri*, 4 Wall. 277, 323.

Neither the statute nor the Executive Order here "punishes" petitioner; there is no "punitive design" in the regulatory scheme. *Fleming* v. *Nestor*, 363 U.S. 603, 617. This Court in *Fleming* v. *Nestor* upheld a statute under which old-age Social Security benefits were terminated because the beneficiary was deported for having belonged to the Communist Party 20 years

earlier. The Court stated the governing standards as follows (363 U.S. at 614).

> Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. * * *

Here, as in *Nestor,* the legislative concern is regulatory. Although the particular refund order may "bear harshly" upon petitioner, it does not inflict a punishment.

d. We note also that the ruling sought to be reviewed here was a temporary measure extending only through the 90-day emergency freeze period of Phase I; it has no application in the current phase of the Economic Stabilization Program. The issue therefore is of minimal prospective importance.[3]

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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[3] Fewer than a dozen cases involving this issue have been referred to the Department of Justice for its consideration, and only two cases are pending in the district courts.

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